

Service Date: May 21, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF the Application)	UTILITY DIVISION
of U S WEST Communications, Inc.)	DOCKET NO. D97.12.243
for Approval of a Residential Win-Back)	
Program Tariff)	ORDER NO. 6068

FINAL ORDER

Background

On December 12, 1997 U S West filed Tariff Transmittal 97-43, Exchange and Network Services Tariff pages, Section 5, "to introduce a Win Back strategy for residence customers who have left U S West and now have service from another local service provider." The terms and conditions of the proposed "Win Back" program are as follows:

- a. This competitive response offering will only be offered to customers returning to U S WEST Communications from a competing telecommunications provider.
- b. Residence customers will receive the waivers only on their initial return to U S WEST Communications.
- c. Customers will receive either a waiver of the current nonrecurring charge, up to two months of recurring rates or both, on selected services determined by U S WEST Communications. Amounts and types of the waivers will vary. In addition, customers may be eligible for waivers of IntraLATA MTS charges.
- d. Total charges waived will not exceed \$100.00 per customer location.
- e. U S WEST Communications reserves the right to discontinue this offer upon 14 days notice to the Montana Public Service Commission.
- f. Periods and provisions of this offer will be determined by U S WEST Communications.

- g. The Win Back Program is a competitive response only, and is not available for resale.

Tariff Transmittal 97-43 was noticed in Utility Division Agenda No. 98-1-5; however, prior to action at Agenda No. 98-1-12 AT&T filed a letter opposing the proposed tariff. U S West responded by letter on January 15, 1998; and on February 20, 1998 Sprint filed a letter in opposition to Win Back.

By staff action on February 26, 1998 the Commission established a briefing schedule in this Docket. U S West filed an opening brief on March 6, 1998; AT&T filed an answer brief, supported by Sprint, on March 20, 1998; and U S West filed a reply brief on March 27, 1998. The parties agreed that at the conclusion of briefing the proposed tariff would be deemed submitted to the Commission for decision.

Discussion

AT&T contends that the Win Back filing violates various federal and state provisions. Section 251 of the Telecommunications Act of 1996 imposes a duty on incumbent local exchange carriers like U S West not to impose unreasonable or discriminatory conditions on the resale of telecommunications services. Federal rule provides that local exchange carriers can limit resale of "short term promotions," if "[s]uch promotions involve rates that will be in effect for no more than 90 days." 47 CFR § 51.613(a)(2)(i). A local exchange carrier can impose additional restrictions on resale, "if it proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 CFR § 51.613(b). AT&T argues that Win Back violates federal law and rule because it is a telecommunications service that is restricted against resale, and the restriction is of unlimited duration.

AT&T also asserts that Win Back violates Sections 69-3-305(5)(a) and 69-3-810(4), MCA. Section 69-3-305(5)(a), MCA, reads in pertinent part: "A provider of regulated telecommunications service may offer, for a limited period of time, rebates, price reductions, or waivers of charges in conjunction with promotions, market trials, or other sales-related activities that are

common business practices." Section 69-3-810(4), MCA, reads in relevant part, "A provider of regulated telecommunications service may withdraw a service upon 30 days' notice to the commission and to the users of the service." AT&T contends that Win Back is not offered "for a limited period of time," contrary to § 69-3-305(5)(a), MCA, and contains a fourteen (14) day withdrawal period, contrary to § 69-3-810(4), MCA.

U S West responds that Win Back is not controlled by the provisions AT&T cites because it "is not a telecommunications service. It is a marketing tool." Opening brief at 3. U S West also "does not concede that ... [Win Back] is promotional pricing subject to the FCC's 90-day presumptions." *Id.* at 4. With respect to Montana law U S West claims § 69-3-305(5)(a), MCA, "expressly authorizes the Commission to approve the program." *Id.* at 5. In addition, U S West argues that because Win Back is not a telecommunications service, and U S West is not proposing the withdrawal of a telecommunications service, the notice provision at § 69-3-810(4), MCA, does not apply.

In its reply brief U S West appears to abandon its arguments that the law cited by AT&T does not apply to Win Back, in favor of the argument that, while the law may apply, it provides the Commission with the discretion to approve Win Back if it finds it reasonable and in the public interest. In support of its contention that the Commission may approve Win Back as filed U S West cites to 47 CFR § 51.613(b) and § 69-3-305(5)(a), MCA. *See* relevant parts of both sections, quoted, *supra*, at pp. 1-2. U S West argues that Win Back as filed can and should be approved by the Commission.

Commission Decision

The Commission does not approve U S West's Win Back tariff, without prejudice to either 1) a refiling of the tariff accompanied by more substantial legal and policy argument; or 2) a refiling that modifies the proposed tariff to take into account the challenges raised by AT&T and Sprint. As filed Win Back appears to violate § 69-3-305(5)(a), MCA, because it is not offered "for a limited period of time." If U S West believes that this section does not apply to Win Back it should affirmatively make that argument if it refiles. Similarly, § 69-3-810(4), MCA, appears in conflict with the Win Back filing, but if U S West thinks otherwise it should so

argue. Also, the Win Back filing ignores federal provisions that appear applicable. It may be that these provisions do not prevent the Commission from approving Win Back as filed, or with certain modifications, but if that is so U S West needs to clearly explain it and make the arguments for Commission approval.

Part of the difficulty with the Win Back filing is that it was made without acknowledgment of the apparent applicability of certain federal and state provisions. The arguments of AT&T and Sprint do not necessarily persuade the Commission that Win Back cannot be approved as filed; but, combined with U S West's tentative and in places confusing response, they convince the Commission that Win Back should not be approved on this record. The Win Back filing raises complex legal and public policy issues which have not been satisfactorily dealt with by U S West. If it refiles, U S West should address those issues directly.

CONCLUSIONS OF LAW

1. U S West is a public utility subject to the regulatory jurisdiction of the Montana Public Service Commission. 69-3-101(f), MCA.
2. U S West's proposed Win Back tariff is subject to the approval of the Montana Public Service Commission. 69-3-807(1), MCA.
3. Based on the record, U S West has not demonstrated that its proposed Win Back tariff complies with federal and state law.

ORDERS

U S West's Tariff Transmittal 97-43, Exchange and Network Services Tariff pages, Section 5.2.11, Win Back Program, is not approved.

DONE AND DATED this 18th day of May, 1998, by a vote of 5-0.

DOCKET NO. D97.12.243, ORDER NO. 6068

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.